

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

To Be Argued By
Cyril Hyman

74-1235

THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

ABDON ACEVEDO, et al.,

Plaintiffs-Appellants,

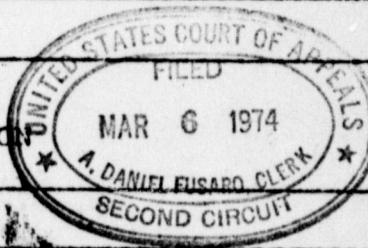
-v-

NASSAU COUNTY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE
GENERAL SERVICES ADMINISTRATION



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EXECUTIVE ORDER

1970 U.S. Cong. & Adm. News 6225	
No. 11512	2,3,5,9, 10,13,16, 20,22

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 74-1235

ABDON ACEVEDO, et al.,
Plaintiffs-Appellants,
v.
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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE
GENERAL SERVICES ADMINISTRATION

STATEMENT OF THE CASE

Plaintiffs-Appellants, representing a class of low-income minority citizens residing in Nassau County filed a complaint in the United States District Court for the Eastern District of New York on March 7th, 1972, [53A]* seeking to enjoin federal defendants from constructing a facility, and alleging, inter alia:

*In this brief the symbol "A" refers to the Appendix, "Tr," refers to the original trial transcript and "ADD" refers to the Addendum consisting of the Affidavit of Robert K. Bogardus sworn to the 25th day of February, 1974, and the Prospectus approved by Congress in May, 1968, filed herewith.

a) That the General Services Administration (hereinafter referred to as "GSA") violated the June, 1971 Memorandum of Understanding with the Department of Housing and Urban Development ("HUD") by failing to assure prospective federal employees available low and moderate income housing prior to the construction of the proposed federal office building in Hempstead, Long Island;

[39-A]

b) That GSA failed to affirmatively further the purposes of Title 8 of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq.;

[39-A]

c) That GSA failed to comply with Executive Order 11512 dated February 27, 1970; [40-A]

d) That GSA had committed itself to erect an office building which would perpetuate and reinforce existing patterns of racial and economic discrimination in housing [40-A]

The complaint also sought certain relief against the Environmental Protection Agency [37-A to 38-A] as to which the action was dismissed by the District Court at the end of the plaintiffs-appellants' case, plaintiffs-appellants having consented to the Government's motion to dismiss. [Tr-1292-1293]

After trial of this matter, the District Court issued its opinion on January 30, 1974, stating that the " * * plaintiffs have also failed to sustain their burden of proof. The charges made against GSA are without merit, rather the evidence discloses that GSA is complying with the Federal

Site Selection laws." [112-A] The Court then dismissed the complaint [114-A]. Plaintiffs-Appellants now appeal.

STATEMENT OF FACTS

For a period of time prior to 1962, UNITED STATES OF AMERICA owned the property known as "Mitchel Air Force Base,* Hempstead, New York." In 1962, after some of the property was declared surplus, the Government conveyed to Nassau Community College some 135 acres of the property pursuant to GSA's surplus regulations. Subsequently, additional acreage was transferred for various purposes to Nassau County and other civic and educational organizations.

The Government retained a portion of its Mitchel Field property. In early 1968, GSA undertook initial site selection activities in the Hempstead area for the construction of a federal office building. Thereafter, on February 27, 1969, President Nixon issued Executive Order 11512 (1970 U.S. Cong. & Adm. News, p. 6225). In May of 1968, the Congress approved a project prospectus for a Post Office facility and a vehicle maintenance facility [ADD no. 1, at page 1] to be built by the Post Office Department, as well as a federal office building for multi-agency use to be constructed by the Public Building Service of GSA on the retained property.

*Ma Bell and General William ("Billy") Lendrum Mitchell's mother spell the crucial name with two "L"s as in llama. The General Services Administration spells it with one "L" in the documents pertinent to this case as does plaintiffs-appellants' counsel. We will follow suit with apologies to Mrs. Mitchell.

Subsequent to the initial Congressional approval in 1968, the proposed occupancy by federal agencies kept changing and it became necessary for GSA to revise the scope of the project. It was also determined that the actual construction site of the proposed federal office building was undesirable and in January, 1973, the original site, together with additional Government-owned acreage, was conveyed to the County of Nassau in exchange for other parcels of land within Mitchel Field and it was then contemplated that the proposed federal office building would be constructed on the one of the exchanged parcels of land.

Due to the changing space requirements of the federal agencies intended to occupy the proposed buildings and due to changes in the statutory provisions applicable to the financing of these buildings effected by the 1972 amendment (Public Law 92-313) to the Public Buildings Act of 1962, GSA revised its proposed prospectus [Tr. 1278] and forwarded it to the Office of Management and Budget ["OMB"] in January, 1973.

The parties to the trial of this action rested their respective cases on July 16, 1973. After the withdrawal of one of the contemplated federal agency tenants from the proposed facility in October, 1973, OMB returned the revised prospectus to GSA for further revision. [Add. No. 2, Bogardus Affidavit, p. 3, 11.7-11]

In January, 1973, HUD and GSA met [693-A] to implement the HUD-GSA Memorandum of Understanding, 41 C.F.R. 101-17.480. To that end, GSA thereafter compiled a questionnaire entitled "Federal Agency Questionnaire" and conducted a survey to determine the various racial and economic factors relating to federal employees working for the agencies to be housed in the proposed facility. GSA sent the questionnaire to over 20 federal agencies who had requested space in the proposed office building at Mitchel Field. [697-A] Pursuant to Executive Order 11512 and the Memorandum of Understanding between HUD and GSA, the information compiled by GSA was conveyed to HUD.

The trial commenced on June 11, 1973, and ended on July 16, 1973. No witness objected to the technical planning of the proposed federal office building on Stewart Avenue in Hempstead. It was established that at the time of the trial HUD was evaluating the various elements contained in Executive Order 11512 and the Memorandum of Understanding with respect to the proposed facility [559-A].

Far more important, however, is the fact that on cross-examination, Mr. Arthur Kunz, Planning Coordinator for the Nassau-Suffolk Regional Planning Board and Assistant Director of the Suffolk County Planning Commission, key local agencies charged with responsibility for overseeing the development of Long Island's two counties, testified as follows:

"Q. As a planner, Mr. Kunz, do you see any objection in placing a federal office building in this area of Mitchel Field along Stewart Avenue?

A. No, because the area along Stewart was classified as a high density corridor where transportation exists and improved transportation is possible.

Q. Can you enumerate any benefits a federal office complex or building might have, if one was to be erected in that area of Mitchel Field, to the population?

A. Primarily, the convenience of dealing with those agencies such as a Court like this that wouldn't be here in Brooklyn, it would serve Long Island or other similar facilities, or the additional jobs that are created locally such as the IRS Center brought to Brookhaven Town.

Q. Would you look at that as a planner as a positive effect on the community?

A. Certainly. We are always looking for non-defense employment and this is the best kind you can get.

Q. And if the federal law provided for minority employment, would that help the minority population of the Island to upgrade themselves financially?

A. It could.

Q. And educationally?

A. Certainly could.

"Q. Do you see as a planner any negative effects a possible federal office building might have in the community?

A. The only negative effects you usually get are the generation of more traffic if you are not able to handle it. And, of course, the land is not land that is on the tax roll, so those are the only negative points.

Q. But is -- that is --

A. That is just a planning argument, as I say. The point at Mitchel Field is that theoretically the transportation facilities can be superio [sic.] to anywhere else in the country because of the number of --

Q. But the effect on people would be overall a positive effect?

A. Yes.

Q. A desirable one, in your opinion?

A. A desirable one, yes." [Tr. p. 426, 11.16-25, p. 427 and p. 428 11.1-11]*

*Counsel for defendant-appellee regrets the length of this quotation but finds its inclusion necessary here in view of the fact that counsel for plaintiffs-appellants failed to include it in his unilaterally-composed Appendix on this Appeal.

Thus, a fair reading of Mr. Kunz's testimony -- Plaintiffs-Appellants' own planning expert -- indicates that the proposed Federal facility attacked in this action will be of great benefit to the community where it is to be located. Mr. Kunz testified as a disinterested expert, without bombast or emotional dialogue, and Defendant-Appellee concurs in his view that the proposed Federal facility will be of great practical benefit to Long Island.

POINT I

THE EVIDENCE ELICITED AT THE TRIAL
SUPPORTS THE DISTRICT COURT'S
FINDINGS THAT GSA IS COMPLYING WITH
THE "FEDERAL SITE SELECTION LAWS."

The gravamen of the complaint dated March 7th, 1972, is that GSA was not following its own regulations in regard to the proposed Federal office building at Mitchel Field since the area lacked adequate low and middle-income housing within a reasonable proximity as required by 41 C.F.R. §101-17. 104-1. In May of 1968, Congress approved the construction of Federal facilities on Government-owned lands located at the former Mitchel Field, Hempstead, New York.

On February 27, 1970, President Nixon signed Executive Order 11512, 35 F.R. 3979, which provided, among other things, that in acquiring or leasing space, the Administrator of GSA shall be guided by 7 different policies. These policies include giving consideration to: the efficient performance of Government agencies' functions; due regard to the public interest and healthful working conditions; the need for development and redevelopment of areas; the development of new communities; the impact a site selection will have on improving social and economic conditions in the new area; and the consistency of the proposed development with State, local and regional plans and programs. Policy number 6 specifically provided that:

The availability of adequate low and moderate income housing, adequate access from other areas of the urban center, and adequacy of parking will be considered; (emphasis supplied).

March 3, 1970, 35 F.R. 3979, 1970, U.S. Cong. & Adm. News, p. 6225.

The evidence at trial showed that GSA and HUD officials were in the process of implementing this Executive Order and the site selection regulations at the time of trial. 41 C.F.R. 101-17.000 to 101-17.303 and 41 C.F.R. 101-17.41.

At the time the site selection determination took place in early 1968, Executive Order 11512 and the Memorandum of Understanding between GSA and HUD dated June 7th, 1972 [41 C.F.R. subpart 101-17.48] were not in existence. Subsequently in 1973 after the physical and financial scope of the proposed Federal project changed, GSA decided that even though site determination which took place in 1968 did not change, it was in the public interest to fully comply with the terms of Executive Order 11512, applicable regulations and its understanding with HUD. The trial record overwhelmingly supports the District Court's conclusion that GSA was complying with the "Federal Site Selection" laws. In January 1973, officials of HUD and GSA had a meeting, the purpose of which was to implement this Memorandum of Understanding as to housing. [693-A]. After the meeting, GSA concluded the necessary surveys to determine the economic and social makeup of potential Federal employees. [697-A] at the time of trial HUD was in the process of evaluating the survey information. [559-A]

It is obvious from this record that the project in question has not received final approval. In fact, the proposed revised prospectus was returned by OMB to GSA for further review [Add. No. 2] The surveys required under the law are presently being conducted and had not been finalized prior to this trial. All of these facts indicate that plaintiffs-appellants' claims are not ripe for decision. Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). This proposition is in compliance with the accepted judicial doctrine that judicial relief must be denied until administrative remedies have been exhausted. Myers v. Bethlehem Ship-Building Corporation, 303 U.S. 41, 50-51, [1938]. Since exhaustion of administrative remedies is concerned with the timing of judicial review of administrative action, it is obvious from the facts of this case that the administrative action has not been completed and therefore plaintiffs-appellants' claims are premature.

POINT II

THE PLAINTIFFS-APPELLANTS HAVE NO STANDING TO CONTEST THE ACTIONS OF THE GENERAL SERVICES ADMINISTRATION.

The Plaintiffs-Appellants lack standing to question the actions of GSA with respect to the proposed Federal office building. The individual Plaintiffs-Appellants do not allege nor did they prove either that they were ever employed by the Government at any time pertinent to this action, or that, if employed, they expect to transfer to the proposed Federal office building or that they have the slightest interest in being employed at the proposed Federal office building. The organizational Plaintiffs-Appellants also fail to allege even the most remote nexus with the Federal Government.

The proposed Federal office building, if constructed, will not displace anyone and there is no assertion that its construction will have the slightest adverse effect on the community. Its economic effect is patently beneficial to the surrounding area, as Mr. Kunz's testimony quoted in the Statement of Facts, supra, so clearly attests.

Under these circumstances, Plaintiffs-Appellants have no "personal stake" in the site selection processes they now attack. Barlow v. Collins, 397 U.S. 159 (1970). Standing is an element of justiciability. Flast v. Cohen, 392 U.S. 83, 95 (1968). One who has standing to maintain an action must show that he has been injured by defendants with respect to an interest which is arguably within the zone of interests to be protected by the statute on which he relies. Association of Data Processing Organizations v.

Camp, 397 U.S. 150 (1970).

Here Plaintiffs-Appellants have not been injured by the selection of the site or the proposed construction of the Federal office building. Their general allegations with respect to housing conditions, even if true, support the conclusion that Nassau County is one of many areas in this Nation adjacent to urban centers where the Government must do its business, having housing problems in terms of availability of decent housing for those of low incomes and those who are members of minority groups against whom the misguided practice discrimination. Assuming that such conditions obtain, they do not confer standing to enjoin the construction of a vitally needed facility which shows promise of substantially alleviating economic hardship in the surrounding area.

Plaintiffs-Appellants do not conceivably fall within a zone of interest protected by Executive Order 11512, February 27, 1970, 35 F.R. 3979 (reprinted at 40 U.S.C.A. §490). That Order requires consideration of the adequacy of housing for low and moderate income federal employees as one of many complex factors to be considered in GSA's Administrator's discretion* in planning, acquiring and managing federal space as is evident from Subsection 2(a)(6) which reads as follows:

" The availability of adequate low and moderate income housing, adequate access from other areas of the urban center, and adequacy of parking will be considered,"

* The Administrator's discretion in the assignment and reassignment of federal space is authorized by 40 U.S.C. §490(a).

GSA's internal policy regulation on the question, 41 C.F.R. §101-17.104-1, deals with basic policy in the acquisition of space by lease and includes, among others, the following subsection.

(a) GSA, in all its determinations with respect to the location of federally constructed buildings and the acquisition of leased buildings, will consider to the maximum possible extent the availability of low and moderate income housing for employees without discrimination because of race, color, religion or national origin and will affirmatively further the purposes of Title VIII of the Civil Rights Act of 1968.

This Order and regulation deal with housing for Government employees, a class into which these Plaintiffs-Appellants do not fall.

Plaintiffs-Appellants also assert their standing under Title VIII of the Civil Rights Act of 1968 (6-A). They allege Defendant-Appellee's failure to take affirmative action to further the purpose of Title VIII, the federal policy of providing, "with constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601.

Title 42 U.S.C. §3608(c) provides that:

"All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this sub-chapter and shall cooperate with the Secretary [of HUD] to further such purposes." (emphasis added)

Plaintiffs-Appellants assume that the proposed Federal office building is a "program of activity relating to housing and urban development" within the Act and that GSA has failed to "administer" it affirmatively to further the fair housing

goal. They argue that because they are concerned about "fair housing," they have standing to enjoin construction of the proposed Federal office building until GSA undertakes to eradicate general housing problems in the area.

The term "fair housing" is undefined and susceptible of many meanings. The interests of these Plaintiffs-Appellants are varied and the relief they seek is unrelated to the conditions they describe. For these reasons it appears unlikely that Plaintiffs-Appellants can prevail on the standing question under 42 U.S.C. §3608(c).

POINT III

THE EXECUTIVE ORDER IN QUESTION
MAY NOT BE ENFORCED THROUGH A
PRIVATE CIVIL ACTION

Appellants-plaintiffs here, allege GSA has violated Executive Order 11512, dealing with planning, acquisition and management of federal space. (6-A)

It is fundamental law that under the doctrine of sovereign immunity, one cannot sue the United States without express consent and if no such consent has been given the courts lack jurisdiction. United States v. Sherwood, 312 U.S. 584 (1941); Mancilla v. United States, 382 F.2d 269 (9th Cir. 1967), cert. denied, 390 U.S. 982, (1968). Such jurisdiction is obtained only by the express act of Congress. Only Congress can authorize a waiver of sovereign immunity. United States v. Shaw, 309 U.S. 495 (1940). An executive order cannot be deemed to waive sovereign immunity because no officer of government can give consent to allow the United States to be sued. United States v. Shaw, supra.

The executive order in question does not mention a judicial remedy; nor does it speak of creating a cause of action for any individual. The order merely announces a policy for guidance of federal agencies.

In Farkas v. Texas Instrument, Inc., 375 F.2d 629

(5th Cir. 1967), plaintiff alleged violation of Executive Order 10925 which required all government contracting agencies to include in their contracts provisions requiring the private contractor not to discriminate against employees because of race, religion, and natural origin. The defendant allegedly did discriminate and plaintiff sued as a third party beneficiary under the government contract. In affirming the District Court's dismissal, the Circuit Court held the executive order did not contemplate enforcement by private civil action. In Farmer v. Philadelphia Electric Company, 329 F.2d 3 (3rd Cir. 1964), which dealt with Executive Order 10925, the District Court held at page 9, "... that the threat of a private civil action to deter contractors from failing to comply with the provisions was not contemplated by the orders."

The plaintiff in Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934, (1970), alleged violation of Executive Order 11246 entitled "Equal Employment Opportunity." The Federal defendants were accused of discriminately passing over Mr. Gnotta for promotion because of his Italian origin. The court at page 1278 held:

"None of the executive orders or regulations which the complaint cites purports to confer any right on an employee of the United States to institute a civil action for damages against the United States, in the event of their violation, even if it should be established that plaintiff's failure to have been promoted as an employee of the Corps of Engineers was in fact due to discrimination in violation of the Executive Orders pleaded.

Congress has complete power either to create or to refuse to create such a remedy. It did not authorize civil actions for damages under any of the laws (including the Executive Orders and regulations) applicable to facts pleaded by plaintiff in this case" (emphasis added).

In Kuhl v. Hampton, 451 F.2d 340 (8th Cir. 1971), the court scrutinized Executive Order 11348. Plaintiff alleged that the United States Postal Service violated this Executive Order by capriciously opening new jobs only to postal clerks and not handlers. The District Court dismissed the case relying on Gnotta v. United States, supra, the Court of Appeals affirming. At page 342 the Court stated:

"It appears clear that the statute and Executive Order set forth a broad basis for a progressive personnel policy, but neither is intended to constitute a statutory or legal framework enforceable in all of its facets by legal proceedings in the courts. The statute and Executive Order constitute managerial directives and do not give a private legal right of action to every governmental employee who feels aggrieved about administration of or the mode in carrying out those statutory and executive directives" (emphasis added).

Executive Order 10988 dealing with collective expression of employment conditions among federal employees was held in Manhattan-Bronx Postal Union v. Granouski, 350 F.2d 451 (1965), cert. denied, 382 U.S. 978 (1966), to be merely an expression of broad policy set by the President for the guidance of

federal agencies. No attempt was found by the court to create any right to judicial remedy for its violation. No right was found to exist in the plaintiff to have the court intervene even if a violation of the Executive Order did exist. At page 457 the Manhattan-Bronx court held,

"Congress has given the district court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees."

It appears then that Executive Orders serve only as Presidential guidelines and policy expressions to be implemented by the appropriate Federal agency and not as the grounds for relief by individuals in civil actions against an agency for allegedly violating the executive order. In Congress of Racial Equality v. Commissioner of Social Security Administration, 270 F. Supp. 537 (1967), the court, in dismissing the complaint based on an alleged violation of Executive Order 11246, stated at page 542, "Executive Order 11246 represents in essence the formulation of a policy by the President for the guidance of federal agencies the President did not attempt to create any role for the judiciary in such administrative proceeding." This is what the Court in Gnotta, supra, held and the court in Blaze v. Moon, 440 F.2d 1348 (5th Cir., 1971), relying on Gnotta held in denying plaintiff's right to sue the Corps of Army Engineers for alleged violation of Executive Order 10925. See also Ogletree v. McNamara, 449 F.2d 93 (6th Cir. 1971).

Nowhere are the words "remedy," "cause of action" or "litigation" mentioned in Executive Order 11512 nor can any of these words be implied from a reading of the Order. Executive Order 11512 merely serves as a broad guideline to be followed by the federal agencies to which it applies and was never and is not now contemplated to create a private civil cause of action. It should be viewed merely as a managerial directive, giving rise to no cause of action for an individual in private civil cases.

Judge Judd in Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (E.D.N.Y. 1972), came to an opposite conclusion by holding that Executive Order 11512 is "... not a mere internal housekeeping arrangement," but that "Private citizens have a right to review compliance with both statutes and regulations relating to the provision of publicly assisted housing." 341 F. Supp. 1029-1030. For this proposition the District Court relied on Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809 (3d Cir. 1970) and Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). However, the Shannon case dealt not with an Executive Order but with the Housing Act of 1949, §105(d), 42 U.S.C.A. §1445(d); Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C.A. §3301 et seq.; Civil Rights Act of 1964 §601, 42 U.S.C.A. §2000(d); Civil Rights Act of 1968 §801 42 U.S.C.A. §3601; National Housing Act §221(d)(3), 12 U.S.C.A. §1715 e(d)(3) and 5 U.S.C.A. §702. The court there held plaintiffs had standing to challenge the alleged non-compliance with the various statutes. Nowhere did the decision confirm the right to bring a private civil action

for an alleged violation of an "Executive Order."

Hammond v. Lenfest, supra, was also relied on by the Brookhaven court for the proposition that "government agencies may be required to live up to their own rules." 341 F. Supp. at 1032. This case also, dealt not with an Executive Order but rather with a Department of Defense Regulation. Petitioner sought and was granted a writ of habeas corpus stemming from a rejection of his application for discharge from the Navy on conscientious objector grounds. Rather than standing for the broad proposition which the Brookhaven court gave this case, it would appear that Hammond stands for the narrower proposition that district courts may review actions by military authorities which violate their own established regulations. As in the Shannon case, no Executive Order was in issue in Hammond. Here, in any event GSA is following all applicable laws and regulations as well as Executive Order 11512.

District Courts are without jurisdiction to adjudicate alleged violations of Executive Orders. Sweet v. B.F. Goodrich Co., 68 F. Supp. 782 (D.C. Ohio 1946); McDaniel v. Brown and Root, 172 F.2d 466 (10th Cir. 1949); Crabb v. Weldon Bros., 164 F.2d 797 (8th Cir. 1947). Executive Orders are no more than policy declarations for the management of the Executive Branch of the Federal Government. Alleged violations should be addressed to the Executive Branch and not the judiciary. See Manhattan-Bronx, supra. Executive Orders do not amount to implied Congressional waivers of sovereign immunity and thus the courts

have no jurisdiction over alleged violations.

In any event, the Plaintiffs-Appellants have failed to show any violation by GSA of any of the applicable laws, rules, regulations or Executive Order 11512. In fact, the evidence before the District Court indicates that GSA has acted to date in accordance with 42 U.S.C. §3608(c), Executive Order 11512 and GSA regulations. It was the Government's contention that the District Court should have refrained from exercising its jurisdiction until after GSA and HUD have determined the questions delegated to them by the Executive Order 11512. It is obvious that the agencies involved should initially decide the particular issue of housing. The Supreme Court of the United States has summarized this subject in one sentence: "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision, or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings." Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947).

CONCLUSION

For the reasons stated, the Order dismissing the complaint should be affirmed.

Respectfully submitted,

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A D D E N D U M

PROJECT APPROVALS

	Submitted	Approved
BUREAU BUDGET	<u>2-20-68</u>	<u>2-27-68</u>
SENATE	<u>3-28-68</u>	<u>5-9-68</u>
HOUSE	<u>3-28-68</u>	<u>5-7-68</u>

PROJECT NUMBERS: (a) 31-0290
(b) 31-0295

PROSPECTUS FOR PROPOSED PUBLIC BUILDING CONSTRUCTION

- (a) POST OFFICE AND
VEHICLE MAINTENANCE FACILITY
(b) FEDERAL OFFICE BUILDING

HEMPSTEAD, NEW YORK

1. DESCRIPTION OF PROPOSED PROJECTS:

The projects contemplate (a) construction of a mechanized Post Office facility, with airconditioning, and a Vehicle Maintenance Facility to provide space for bulk mail handling operations, and (b) the construction of a Federal Office Building, with airconditioning, to provide space for multi-agency use. Both projects will be constructed on Government-owned land reserved for Federal construction at the former Mitchel Field, Hempstead, New York.

	Gross (Sq. Ft.)	Net (Sq. Ft.)
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Approximate Areas:

(a) Post Office Facility	307,900	277,000
Vehicle Maintenance Facility	9,400	8,600
(b) Federal Office Building	1,477,000	1,062,500

2. ESTIMATED MAXIMUM COST OF PROJECTS:

(a) Post Office Facility and VMF

(1) Design, engineering, etc.	\$ 675,000
(2) Improvements (As of October 1969)	<u>8,807,000</u>
Total estimated maximum cost	\$ 9,482,000

(b) Federal Office Building

(1) Design, engineering, etc.	\$ 2,043,000
(2) Improvements (As of February 1970)	<u>48,920,000</u>
Total estimated maximum cost	\$ 50,963,000

PROJECT NUMBER: (a) 31-0290
(b) 31-0295

3. JUSTIFICATION:

Hempstead, in Nassau County, Long Island, with a population of about 41,000, is located 22 miles east of New York City. The community is residential with small industries contributing to its stable economy.

Federal activities in Nassau and adjacent Queens County occupy about 1,860,000 square feet of Government-owned space and about 1,700,000 square feet of leased space. There are no general purpose Federal buildings in the two counties. The Government-owned space, comprised of 18 Post Office buildings, and a Department of Defense building providing about 407,000 square feet of space for the Army Pictorial Center is special purpose and/or location. The Post Office buildings are entirely occupied by the Department except for about 121,600 square feet of space in the Long Island City Postal Concentration Center occupied by the Department of Defense.

The Post Office Department occupies about 978,000 square feet of leased space in the two counties at an annual cost of approximately \$2,000,000. Twelve other nonpostal agencies occupy about 722,000 square feet of leased space at an annual cost of about \$3,000,000.

Studies of the Federal space situation in Queens and Nassau Counties indicate that the Post Office Department and the nonpostal Federal agencies have an urgent need for expanded facilities. The postal operations for Western Nassau County will be centered in Hempstead. These operations are presently carried out in about 14,500 square feet of inadequate space in the Government-owned Post Office at Hempstead and about 75,900 square feet at six leased locations at an annual cost of \$227,000. The lack of adequate facilities provided by the Hempstead Post Office, plus the excessive volumes of mail and the congested postal quarters, have necessitated the implementation of split operations at Mineola, Garden City and Hempstead. It has also increased congestion at the Postal Concentration Center in Long Island City. These split operations result in additional mail handling and the transportation of mail thereby increasing operating costs.

Postal space requirements cannot be met through present available commercial space in the community and the cost of facilities comparable to those proposed herein which might be constructed for lease to the Government would exceed that of the proposed project.

The most satisfactory means of providing for the current and foreseeable needs of the Post Office Department and other agencies requiring general purpose space is by the construction of a Post Office and Vehicle Maintenance Facility to satisfy postal requirements and a Federal Office Building for other agencies. The new

PROJECT NUMBERS: (a) 31-0290
(b) 31-0295

3. JUSTIFICATION: (Cont'd)

Post Office and Vehicle Maintenance Facility will consolidate the mail handling activities of the Department at one location resulting in greater economy and increased efficiency of operation. The completion of the proposed postal facility will enable the Department to release approximately 57,500 square feet of leased space resulting in annual rental savings of about \$91,600.

It is contemplated that the design and construction of the proposed postal facility will be performed by the Post Office Department under authority delegated on December 1, 1966, to the Postmaster General by the Administrator of General Services pursuant to Sec. 15 of the Public Buildings Act of 1959, as amended (40 U.S.C. 614) and that the Department will request the appropriation of funds required for site acquisition, design, engineering, and construction. Any other funds obligated by the Department for site, design, and other costs incurred in the development of a similar project under its leasing authority, which this project will supersede, will be reimbursed to the Post Office Department Site Acquisition Revolving Account from any appropriation made available for the proposed project.

The new Federal Office Building will permit consolidation at one location of agencies presently housed in approximately 566,000 square feet of scattered leased space with an annual rental saving of about \$1,846,000.

The proposed Federal Office Building will provide space for the Social Security Administration's Payment Center whose foreseeable space requirements cannot be satisfactorily provided for at present leased locations. In view of a foreseeable need to provide space for the U.S. Courts, sufficient reserve space is included that can be altered to meet this requirement upon proper determination by the Judicial Council of the Second Circuit that space for holding court at this location is required.

The two projects can be advantageously and economically located on approximately 38 acres of available Government-owned land at the former Mitchel Field in Hempstead, Nassau County, New York. The site is bounded on the north by the Long Island Railroad, on the west by Oak Street, on the east by the Nassau Community College and Department of the Navy housing, and on the south by light industry and open space. The terrain of the site is level and demolition costs would be negligible.

The proposed postal facility, including parking for approximately 310 postal vehicles, official, employee and patron parking, plus maneuvering area, will be located on about 15.5 acres of this site.

PROJECT NUMBERS: (a) 31-0290
(b) 31-0295

3. JUSTIFICATION: (Cont'd)

The proposed Federal Office Building, including parking for about 1,000 official, employee and visitor vehicles, will be located on about 22.5 acres of the site. There are no local ordinances relating to the provision of off-street parking facilities in this area.

Provision has been made in the estimated project cost for fallout protection in the postal facility and the Federal Office Building in accordance with the Office of Civil Defense Technical Requirements for Fallout Shelters issued March 1965.

PROJECT NUMBERS: (a) 31-0290
 (b) 31-0295

4. ANALYSIS OF PROVIDING SPACE BY NEW CONSTRUCTION COMPARED WITH LEASING:

An alternate method of providing suitable space in lieu of that proposed herein is by the leasing of privately owned space. The following is a comparison of the cost of the proposed construction with the cost of leasing.

	<u>Proposed</u> <u>New</u> <u>Building</u>	<u>Comparable</u> <u>Leased Space</u>	<u>Savings</u> <u>Through New</u> <u>Construction</u>
<u>POST OFFICE AND VEHICLE MAINTENANCE FACILITY</u>			
(1) Estimated amount of annual rental - \$913,920:			
Invested in:			
a. Rental of leased space (Unserviced) for 40 years	-	\$36,556,800	-
b. Project cost (design and improvements)	\$ 9,482,000	-	-
c. Interest at $4\frac{1}{2}\%$, for period required to amortize Government project cost	<u>3,570,588</u>	<u>-</u>	<u>-</u>
(2) Total Investment	\$13,052,588	\$36,556,800	\$23,504,212
(3) Repair and upkeep for 40 years at \$.40 per sq. ft.	<u>4,569,600</u>	<u>-</u>	<u>(-) 4,569,600</u>
(4) Total 40-year cost	<u>\$17,622,188</u>	<u>\$36,556,800</u>	<u>\$18,934,612</u>
a. Annual cost	\$ 440,555	\$ 913,920	\$ 473,365
b. Per sq. ft.	\$ 1.54	\$ 3.20	\$ 1.66

NOTES:

- A. Estimated useful life of new building - 40 years
- B. Amortization of the project cost of \$9,482,000 @ $4\frac{1}{2}\%$ interest will require 14.3 years of annual payments of \$913,920, the rental rate for comparable leased space.
- C. Square footage in building - 317,300 gross area; 285,600 net area.
- D. Normal operation and maintenance excluded since it would be the same in either situation.

PROJECT NUMBERS: (a) 31-0290
 (b) 31-0295

4. ANALYSIS OF PROVIDING SPACE BY NEW CONSTRUCTION COMPARED WITH LEASING:
 (Cont'd)

<u>FEDERAL OFFICE BUILDING</u>	<u>Proposed</u>	<u>New Building</u>	<u>Comparable Leased Space</u>	<u>Savings Through New Construction</u>
(1) Estimated amount of annual rental - \$3,984,375:				
Invested in:				
a. Rental of leased space (Unserviced) for 50 years			\$199,218,750	
b. Project cost (Design and improvements)		\$ 50,963,000		
c. Interest at $4\frac{1}{2}\%$; for period required to amortize Government project cost		<u>26,555,478</u>		
(2) Total Investment	\$ 77,518,478	\$199,218,750		\$121,700,272
(3) Repair and upkeep for 50 years at \$.60 per sq. ft.	<u>31,875,000</u>			(-) 31,875,000
(4) Total 50-year cost	<u>\$109,393,478</u>	<u>\$199,218,750</u>		<u>\$ 89,825,272</u>
a. Annual cost	\$ 2,187,870	\$ 3,984,375		\$ 1,796,505
b. Per sq. ft.	\$ 2.06	\$ 3.75		\$ 1.69

NOTES:

- A. Estimated useful life of new building - 50 years
- B. Amortization of the project cost of \$50,963,000 @ $4\frac{1}{2}\%$ interest will require 19.5 years of annual payments of \$3,984,375, the rental rate for comparable leased space.
- C. Square footage in building - 1,477,000 gross area; 1,062,500 net area.
- D. Normal operation and maintenance excluded since it would be the same in either situation.

PROJECT NUMBERS: (a) 31-0290
(b) 31-0295

5. CURRENT HOUSING COSTS: *

	PO & VMF		FOB	
	Area Sq. Ft.	Annual Cost	Area Sq. Ft.	Annual Cost
Leased space:				
Rent and other costs . . .	57,493	\$172,087	566,136	\$2,345,762

* For agencies to be housed in the proposed buildings.

6. PROPOSED SPACE PLAN FOR HOUSING FEDERAL AGENCIES:

A plan for housing Federal agencies in the locality is attached (Exhibit A). Upon completion of construction, assignment and reassignment of space will be made in accordance with existing law.

7. STATEMENT OF NEED:

It has been determined that (1) the needs for space of the Federal Government in this area cannot be satisfied by utilization of existing suitable property now owned by the Government, and (2) suitable rental space is not available at a price commensurate with that to be afforded through the proposed action.

Submitted at Washington, D.C. on

MAR 27 1968

Recommended:

William A. Belmer
Commissioner, Public Buildings Service

Approved :

George B. Tamm
Administrator of General Services

POST OFFICE AND VEHICLE MAINTENANCE FACILITY

HEMPSTEAD, NEW YORK

Present-value analysis of Federal construction compared with leasing.
The pertinent data concerning this project is as follows:

I. Problem

1. Net Area of Building	285,600 sq. ft.
2. Site, Design, Engineering, etc.	\$ 1,087,500 ^{1/}
3. Estimated Improvement Cost	\$ 8,807,000
4. Annual Rental of Space Comparable to New Building (285,600 sq. ft. x \$4.60)	\$ 1,313,760
5. Estimated Number of Personnel to be Housed	892
6. Economically Useful Life of Building	40 years

II. Cost Inclusions

A. Construction

1. Site, Design, Engineering, etc.	\$ 1,087,500
2. Estimated Improvement Cost	\$ 8,807,000
3. Maintenance and Operation (285,600 sq. ft. x \$1.40 x 18.4016)	\$ 7,357,696
4. Repair and Improvements (285,600 sq. ft. x 5.01665)	\$ 1,432,755
5. Impacted Area Payment (892 x \$28.57 x 18.4016)	\$ 468,954
TOTAL	\$ <u>19,153,905</u>

B. Leasing

(285,600 sq. ft. x \$4.60 x 18.4016)	\$ <u>24,175,286</u>
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^{1/} Includes \$412,500 estimated fair value of Government-owned land.

FEDERAL OFFICE BUILDINGHEMPSTEAD, NEW YORK

Present-value analysis of Federal construction compared with leasing.
The pertinent data concerning this project is as follows:

I. Problem

1. Net Area of Building	1,062,500 sq. ft.
2. Design, Engineering, etc.	\$ 2,641,800 <u>1/</u>
3. Estimated Improvement Cost .	\$ 48,920,000
4. Annual Rental of Space Comparable to New Building (1,062,500 sq. ft. x \$5.18)	\$ 5,503,750
5. Estimated Number of Personnel to be Housed	4,175
6. Economically Useful Life of Building	50 years

II. Cost InclusionsA. Construction

1. Design, Engineering, etc.	\$ 2,641,800
2. Estimated Improvement Cost	\$ 48,920,000
3. Maintenance and Operation (1,062,500 sq. ft. x \$1.43 x 19.7620)	\$ 30,025,839
4. Repair and Improvements (1,062,500 sq. ft. x 6.64913)	\$ 7,064,701
5. Impacted Area Payment (4,175 x \$28.57 x 19.7620)	\$ <u>2,357,206</u>
TOTAL	\$ <u>91,009,596</u>

B. Leasing

(1,062,500 sq. ft. x \$5.18 x 19.7620) \$ 108,765,108

1/ Includes \$598,800 estimated fair value of Government-owned land.

COMPREHENSIVE HOUSING PLAN

THE JOURNAL OF CLIMATE VOL. 17, NO. 10, OCTOBER 2004

Agency Space:		# Retained G/O Building		Identity		Sq. Ft.	
Leased Space to be Replaced	57,500	277,000	-	566,136	717,000	1,452,983	
Agency Expansion	219,500	-	-	160,564	-	406,675	
Reserve for Expansion	-	-	1/	-	110,000	-	
Vehicle Maintenance Facility	-	-	8,600	-	-	30,000	
Garage	-	-	-	-	-	16,100	
Service Areas	-	-	1/	-	-	-	

<u>Required Locations</u>	<u>Sq. Ft.</u>	<u>Location</u>
Identity		
Post Office Dept. - Branch Offices	920,479	
Civil Aeronautics Board	1,350	
Courts - Ref-In-Bankruptcy	3,550	
Environ. & Science Ser. Agcy. - Weather Bureau	6,267	
Defense - Recruiting Offices	4,172	
Federal Aviation Agency	37,149	
NEW-BOASI-District Offices	54,665	
Justice - FBI	1,792	
Selective Service System	16,557	
Treasury - IRS	24,337	
Treasury - Customs Ser.	4,050	
Treasury - Coast Guard Rec.	321	
Total Leased Space Retained	1,013,650	

11 / Included in agency space

2/ Assignment of time in this building is subject to change at the time the project is completed.

CHIEF S. 2 OF ATTACHED
FOR THIS P. C. SUIT

-----x
ADDON ASSOCIATES, et al., :
Plaintiffs-Appellees, :
-against- : AFFIDAVIT
NASSAU COUNTY, et al., : No. 74-1235
Defendants-Appellees, :
-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT K. DODDARD, being duly sworn, deposes and says:

I am the Regional Commissioner, Region 2, Public Buildings Service, General Services Administration, and am in charge of all matters relating to the acquisition of the land site, the planning, design and construction of the Federal Office Building project at Mitchel Field, Nassau County, New York. I am familiar with the subject litigation and make this affidavit in opposition to the motion made by plaintiffs-appellees for an injunction pending appeal, restraining the General Services Administration from proceeding with the development of a federal installation at Mitchel Field.

In May 1968 the Congress approved a project prospectus submitted pursuant to Section 7 of the Public Buildings Act of 1959, which covered the proposed construction of a Post Office

facility and vehicle maintenance facility and a Federal Office Building for multi-agency use on a site containing approximately 33 acres of Government-owned land. Since the said approval, however, the United States Postal Service and the Social Security Administration, whose requirements were included in the project, withdrew therefrom. Moreover, the contemplated site was determined to be inadequate for the development needs of the Federal Government. In addition, a revision to the project plans was required in order to accommodate an urgent requirement for a new Federal Archives and Records Center building. Accordingly, the original Government site was discarded as inappropriate for Government use. On January 11, 1973 said site, together with additional Government-owned acreage, was conveyed to the County of Nassau in exchange for two parcels of land containing 22.5 acres and 15.469 acres, respectively. It was contemplated that the Federal Office Building and the Federal Records Center would be constructed on the 22.5 acre site and that the 15.469 acre site would be transferred to the Federal Aviation Administration for the construction of a new Air Traffic and Radar Facility known as the New York Common Instrument Flight Rule Installation (CIFRI). GAI is currently engaged in the process of transferring the said 15.469 acre site to FAA and when accomplished, GAI will have no further involvement in the development, planning or construction of the CIFRI.

By reason of the above mentioned changes and by virtue of the enactment of the Public Buildings Amendments of 1962 (P.L. 92-313) under which the proposed federal project was to be financed, GSA prepared and forwarded to the Office of Management and Budget on January 3, 1973 a revised prospectus for OMB review and consideration prior to its submission to the appropriate Congressional committee. While under consideration by OMB, and in October 1973, the National Archives and Records Service likewise withdrew from the project. The revised prospectus theretofore forwarded to OMB was accordingly returned to GSA for further study and revision. Such study is still under consideration within GSA and when completed, another revised prospectus will be prepared and if approved by OMB, will then be submitted to the Congressional Committees in lieu of the prospectus approved by the said committees in May 1968.

GSA recognizes its obligations under Executive Order 11512, Title VIII of the Civil Rights Act of 1968 and rules and regulations promulgated thereunder and fully intends to comply therewith. Since the acquisition of title to the federal site in January 1973, GSA has made surveys and compiled data and will continue to consult and coordinate its activities with the Department of Housing and Urban Development. These activities have now been deferred and further definitive

planning has been delayed until the identity of all federal agencies to be housed and their space and utilization requirements in the federal complex have been ascertained and final decision made on the details of the proposed project funding. These matters which are directly related to the development of the entire project require and are receiving the attention of many governmental bodies concerned and it is essential that all such development activity continue without impairment or interruption.

3/
ROBERT K. BOULDING

Sworn to before me
this 25th day of February 1974.

Ronald D. Gandy, Notary Public
State of New York
Cert. Reg'd. No. 100000000000000000
Commission Expires March 22, 1974

JDP:CH:sm
F.#740071

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

STELLA MAGIER, being duly sworn, says that on the 6th day of March, 1974, I deposited in Mail Chute Drop for mailing in the U. S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of Brief of Appellee General Services Administration of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the persons hereinafter named, at the place and address stated below:

Richard F. Bellman, Esq.
Lois D. Thompson, Esq.
J. Christopher Jensen, Esq.
Suburban Action Institute
150 White Plains Road
Tarrytown, N. Y. 10591

Leonard S. Clark, Esq.
Nassau County Legal Services
285 Fulton Avenue
Hempstead, New York

Joseph Jaspan, Esq.
County Attorney of Nassau-County
Nassau County Executive Building
West Street
Mineola, New York

John F. O'Shaughnessy, Esq.
Town Attorney
Town Hall
Hempstead, New York

Sworn to before me this
6th day of March, 1974

Sue Homan
Sue Homan
Notary Public, State of New York
No. 30-1915175
Qualified in Nassau County
Commission Expires March 30, 1976

Stella Magier